

**National Advisory Committee  
to the U.S. Representative to the  
Commission for Environmental Cooperation**

October 15, 2001

The Honorable Christine Todd Whitman  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue  
Washington, D.C. 20460

Dear Governor Whitman:

The National Advisory Committee (NAC) to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC) held its seventeenth meeting on October 4 and 5, 2001, in Washington, D.C.

The Committee reviewed the 2002-2004 Proposed Program Plan and Budget for the CEC at the meeting and will be submitting a separate advice letter on the plan. The subject of this letter is the citizen submission process under Articles 14/15 of the North American Agreement for Environmental Cooperation (NAAEC). During our meeting, the Committee received a briefing from representatives of the EPA Office of International Environmental Policy and its Office of General Counsel on the status of the citizen submission process, and the pending Migratory Bird Treaty Act (MBTA) submission concerning the United States.

The Committee was most disturbed to learn that the United States is proposing a conditional approval of the MBTA submission that would confine the CEC Secretariat to investigating the particular events that were identified in the submission as illustrative examples. The Committee was also concerned that the proposed U.S. response would require the Secretariat to submit a work plan to the United States for approval.

We have considered the integrity of the citizen submission process extensively in our previous meetings, and our earlier advice reflects the Committee's commitment to maintaining the consistency and transparency of the process. The Committee's advice of May 24, 2001 stated that we recommend that the U.S. government maintain its position to support the preparation of factual records "to the greatest extent practicable" when the Secretariat finds that a factual record is warranted.

Consistent with that advice, we strongly recommend that the United States approve the development of a factual record of the MBTA submission without conditions for the following three reasons:

First, a conditional approval of a Secretariat proposal for preparing a factual

record would set a highly undesirable precedent for future actions by other NAAEC parties. We understand that, legally, actions taken by the Council in response to a particular Secretariat recommendation do not bind future Council decisions. Nonetheless, if the United States responds with conditions in this case, it will undoubtedly substantially increase the likelihood that the other NACEC parties will also do so in the future, thereby undermining the integrity of the Article 14/15 process.

Second, the conditions proposed by the U.S. would inevitably reduce the transparency of the Article 14/15 process. The Joint Public Advisory Committee (JPAC) has recommended that the Council provide its reasoning for any vote against the development of a factual record. A conditional approval is, in effect, a vote against part of the submission, but without an explanation of the Council's reasoning.

Third, the conditions proposed for the MBTA submission would dramatically increase the burden on submitters to document numerous instances of non-enforcement, thereby undermining the capacity of the process to provide an overall perspective on enforcement trends. The Article 14/15 process may also be inundated by additional submissions with each new example of non-enforcement that is discovered by the submitter.

With regard to the negotiation of a work plan for the development of the factual record, the Committee believes that the independence of the Secretariat may be unduly restricted and lead to further uncertainty in the Article 14/15 process. We understand that the Secretariat has developed a work plan for previous submissions in consultation with the Parties, and believe that such an approach is sufficient to provide the parties with adequate information about the preparation of a particular factual record.

We would welcome copies of this advice being forwarded to other agencies involved in the interagency process regarding the MBTA decision.

Very Truly Yours,

Adam B. Greene  
Acting Chair, National Advisory Committee

cc: Judith Ayers, Assistant Administrator for International Activities  
Denise Ferguson-Southard, Chair, U.S. Governmental Advisory Committee  
Liette Vasseur, Chair, Joint Public Advisory Committee  
Stewart Elgie, Chair, Canadian National Advisory Committee  
Mateo Castillo Ceja, Chair, Mexican National Advisory Committee  
U.S. National Advisory Committee